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MARIATON DARUSSALAM & ANOR v. ABDUL RAHIM OMAR & ORS

HIGH COURT MALAYA, SHAH ALAM
WAN AHMAD FARID SALLEH JC
[CIVIL SUIT NO: 22NCVC-295-06-2015]
10 MARCH 2016

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LAND LAW: *Power of attorney – Admissibility – Irrevocable power of attorney – Claim for rights in land – Failure to secure attendance of attesting witnesses – Whether fatal – Whether conditions under s. 90 of Evidence Act 1950 fulfilled – Whether irrevocable power of attorney for valuable consideration construed as sale and purchase agreement – Whether enforceable as valid contract – Powers of Attorney Act 1949, s. 6*

C

LAND LAW: *Ownership – Claim for – Unstamped sale and purchase agreement – Whether valid – Whether admissible as evidence to support claim on land – Whether court had power and responsibility to impound unstamped documents – Whether document admissible on payment of stamp duty or penalty – Stamp Act 1949, s. 52(1)(a)*

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EVIDENCE: *Documentary evidence – Admissibility of – Irrevocable power of attorney – Claim for rights in land – Failure to secure attendance of attesting witnesses – Whether fatal – Whether conditions under s. 90 of Evidence Act 1950 fulfilled – Whether irrevocable power of attorney for valuable consideration construed as sale and purchase agreement – Whether unstamped sale and purchase agreement valid – Whether admissible as evidence to support claim on land*

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Omar Abdullah ('Omar'), the late father of all the defendants, died intestate. Two separate applications were taken out to distribute the estate of Omar under the Small Estates (Distribution) Act 1955 ('Act'). The first application was heard and disposed in 1994. The second application was filed in respect of the disputed land, the subject matter of the present application, as it was not included in the first hearing. The land was ordered to be distributed according to the law of *faraid* and was consequently transmitted and registered in the names of the defendants according to their respective undivided shares. The plaintiffs sued the defendants claiming that the disputed land was rightfully theirs. The first plaintiff was one of the alleged two donees in the disputed irrevocable power of attorney ('DIPOA'), the donor of which was allegedly Omar. The title deed of the disputed land was in the custody of the first plaintiff. The other alleged donee was one Mastor Lani, deceased, the father of the second plaintiff. The second plaintiff filed the present action in his capacity as the administrator of the estate of the deceased. Form F under the Act in respect of the estate of Mastor Lani

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specifically included the disputed land as part of the immovable property to be distributed amongst the beneficiaries. The plaintiffs' case basically hinged on two main documents: (i) an unstamped sale and purchase agreement ('P1') in respect of the disputed land between Omar and Mastor Lani and Mohdir Anbali, the first plaintiff's husband, for a consideration of RM2,500; and (ii) the DIPOA, the power of attorney for valuable consideration of RM1,000. The plaintiff alleged that the second hearing of the small estate distribution was tainted with fraudulent misrepresentation on the part of the third defendant. The plaintiffs also alleged that Omar had cheated them when he sold the property twice. The plaintiffs, *inter alia*, sought (i) judicial recognition on the validity of P1 and the DIPOA that they were enforceable at law and in equity; and (ii) a declaration that notwithstanding that the defendants were the registered owners of the disputed land, they were only bare trustees in favour of the plaintiffs.

Held (dismissing plaintiffs' claim with costs):

(1) Pursuant to s. 52(1)(a) of the Stamp Act 1949 ('Stamp Act'), until and unless the document in question, in this case P1, is duly stamped, it shall not be admitted in evidence. However, the prohibition is not absolute. The court has the power and responsibility to impound unstamped documents, if produced, and to admit them on payment of stamp duty or penalty, if any, under proviso (a) to s. 52(1) of the Stamp Act. Hence, P1 was admitted as evidence and the plaintiffs were ordered to pay to the Collector of Stamp Duty the prescribed fees or penalty under proviso (a) to s. 52(1) of the Stamp Act. In any event, the failure to stamp P1 was only negligence on the part of Omar. The failure could not be construed as a fraudulent misrepresentation. (paras 21 - 23 & 72)

(2) SP1, one of the attesting witnesses to P1, was a truthful witness and had no interest in the outcome of the proceedings. The court accepted his evidence that the incident did take place and SP1 did witness the parties, including Omar, affixing the thumbprints on P1. (paras 24, 27, 29 & 30)

(3) On the admissibility of the DIPOA, it was conceded that both Omar and one of the attesting witnesses had died. The other attesting witnesses to the DIPOA were one Kamaruddin and the Commissioner for Oaths, Rokhiyah. However, the plaintiffs had failed to adduce any evidence to show that either Kamaruddin or Rokhiyah were dead, unfit by reasons of their bodily or mental condition, beyond the seas and 'it was not practicable to secure their attendance' within the meaning of s. 73A(1)(b) of the Evidence Act 1950 ('EA'). The failure was fatal and rendered the DIPOA inadmissible in evidence. (paras 33 & 38)

(4) It is not mandatory for the court to raise the presumption under s. 90 of the EA and three conditions must be fulfilled before the court could exercise its discretion under s. 90, *ie*, (i) the document must be at least 20 years old; (ii) it must be produced in the court from proper custody; and (iii) the original document must be produced in court and not the copy or certified true copy of the same. The DIPOA was dated 27 November 1987 and therefore fulfilled the first condition. However, there was a break in the chain of custody of the DIPOA and hence, the proper custody was not established. Further, SP7 had failed to adduce the original document of the DIPOA and only the copy was produced. The production of a copy is not sufficient to justify the presumption of due execution of the original under s. 90. In the circumstances, the presumption under s. 90 could not be invoked to admit the DIPOA. (paras 39, 40 - 45 & 51)

(5) Pursuant to s. 67 of the EA, the onus of proving the DIPOA was on the person who wanted to tender it, *ie*, the plaintiffs, and it had never shifted to the defendants. The duty to call expert witness fell on the plaintiffs, but it was not done. In the circumstances, the DIPOA was not admissible. (paras 48, 49 & 51)

(6) The allegation of Omar having sold the disputed land twice was misplaced. An irrevocable power of attorney, even if for valuable consideration within the meaning of s. 6 of the Powers of Attorney Act 1949, cannot be construed as a sale and purchase agreement with the necessary essence and ingredients of a valid and enforceable contract. The implication of the DIPOA being excluded in evidence meant that Omar could not have sold the disputed land twice. (paras 71 & 72)

(7) Registration of the transfer was contingent upon the consent from the State Authority. The court has no power or discretion to interfere on the matter of consent in respect of the transfer of the disputed land which is within the exclusive jurisdiction of the state. There was no evidence that Omar had taken the necessary steps to apply for the consent of the State Authority in order to perfect the alleged transfer. Until and unless the necessary consent from the State Government was properly obtained, there was no registrable interest in favour of Mohdir and Mastor Lani, *ie*, the transaction was inchoate. Therefore, there was no bare trust created in favour of Mohdir and Mastor Lani and consequently, neither Mohdir and Mastor Lani nor any of the plaintiffs would have any caveatable interest on the disputed land. (paras 58, 60, 61, 62, 66 & 67)

(8) Knowledge *per se* of an unregistered interest does not in itself constitute fraud. It has to be followed by dishonesty. However, the law is that dishonesty must not be assumed solely by reason of knowledge of an

unregistered interest. There was no indication that the defendants were dishonest. The third defendant, in filing an application for a second hearing, was only asserting the defendants' rights under the *faraid* law. (paras 85 & 86)

(9) There was a clear delay on the part of the plaintiffs in asserting their rights, if any, in the disputed land. Apart from lodging a private caveat the first plaintiff did nothing to enforce her rights. Likewise, Mohdir and Mastor Lani, although survived Omar, did nothing to assert their rights. Further, the first plaintiff did not do anything to enforce her alleged interest notwithstanding the fact that the receipts of the quit rents which she had been paying bore the name of Omar. The plaintiffs were practically sitting and sleeping on their rights. Where there was clear evidence of laches, acquiescence and delay on the part of the plaintiffs, as in this case, discretion should not be exercised in their favour. (paras 90 & 92)

Case(s) referred to:

American Express International Banking Corp v. Tan Loon Swan [1992] 1 CLJ 9; [1992] 1 CLJ (Rep) 1 SC ***(foll)***

Basant Singh v. Brij Raj Saran Singh AIR 1935 PC 132 ***(foll)***

Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC ***(dist)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Berhad (Formerly Known As Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Chen Kow lwn. Yew Sin Motor Supply Sdn Bhd [1994] 4 CLJ 495 HC ***(refd)***

Datuk Harris Mohd Salleh v. Seck Mun Foo [1999] 2 CLJ 545 CA ***(dist)***

Doe D Rochester (BP) v. Bridges 109 ER 1001 ***(refd)***

Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd [2010] 9 CLJ 225 HC ***(dist)***

Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor [1985] 1 LNS 44 FC ***(refd)***

Goo Hee Sing v. Will Raja & Anor [1994] 1 CLJ 255 HC ***(refd)***

KGV & Associates Sdn Bhd v. The Co-Operative Central Bank Ltd [2006] 4 CLJ 241 CA ***(refd)***

Lakhi Baruah & Ors v. Padma Kanta Kalita & Ors [1996] AIR 1253 ***(refd)***

Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor [2013] 5 CLJ 425 FC ***(refd)***

Mah Siew Seng & Anor v. Seema Development Sdn Bhd & Another Case [2013] 8 CLJ 1058 HC ***(refd)***

Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors [1982] CLJ 66B; [1982] CLJ (Rep) 217 FC ***(foll)***

Malaysia National Insurance Sdn Bhd v. Tan Kong Min [1997] 3 CLJ Supp 121 HC ***(refd)***

Matair Suhaili & Anor v. Rose Foo Chin Lan & Ors [2007] 5 CLJ 406 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Pernec Corporation Bhd v. A & AT Advanced Power Systems Sdn Bhd [2013] 1 LNS 374 CA ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 9 CLJ 902 CA ***(refd)***
Sidek Hj Muhamad & Ors. v. The Government Of The State Of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC ***(refd)***
Suratmin Othman v. Yusof Omar & Ors [1998] 2 CLJ Supp 380 HC ***(refd)***
Tsia Development Enterprise Sdn Bhd v. Awang Dewa [1983] 1 LNS 52 HC ***(refd)***
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener) [1994] 3 CLJ 265 HC ***(dist)***

Legislation referred to:
Companies Act 1965, s. 132C
Evidence Act 1950, ss. 67, 73A(1)(b), 90
National Land Code, s. 340(2)(a)
Penal Code, s. 420
Powers of Attorney Act 1949, ss. 5, 6(1)(a)
Stamp Act 1949, s. 52(1)(a)

Evidence Act 1872 [Ind], s. 90

For the plaintiffs - Siti Noryani Samsuddin (Abdul Razak Ismail with her); M/s Noryani & Assocs
For the defendants - Desmond Ho Chee Heong; M/s Desmond Ho & Assocs

Reported by S Barathi

JUDGMENT

Wan Ahmad Farid Salleh JC:

Prologue

[1] Let me begin at the beginning. The plaintiffs had come to this court to seek judicial recognition on two documents which had a far reaching impact on their rights to a piece of land now known as PM2952 Lot 2333, Tanjung Ketum, Mukim Sungai Panjang, Sabak Bernam Selangor with an area measuring 1.4913 hectares ("the disputed land") which they claimed to be rightfully theirs. The disputed land is now registered in the name of all the defendants herein according to the irrespective shares.

[2] It is unfortunate that the *dramatis personae*, if I may, in respect of the documents sought to be enforced in this court, had long gone and dead with the exceptions of the first plaintiff and SP1. In the circumstances, we were deprived of the benefit of the maker, the signatories of the documents, coming to the court to give their version of the case.

The Background

[3] The first plaintiff is one of the alleged two donees in the disputed irrevocable power of attorney dated 27 January 1987 ("DIPOA") the donor of which was allegedly one Omar bin Haji Abdullah ("Omar"), the late father

of all the defendants, in respect of the disputed land. The title deed of the disputed land was in the custody of the first plaintiff. As to how did it get into her possession will be discussed later.

[4] The second plaintiff is one of the children of one Mastor Lani bin Anbali ("Mastor Lani"), also deceased, who is filing this action in his capacity as the administrator of the estate of the deceased. The late Mastor Lani who died on 26 October 1992, was the other alleged donee in respect of the DIPOA. In any case ID9 (which by consent of both parties at the submission stage is converted to P9), which is Form F under the Small Estates (Distribution) Act 1955 in respect of the estate of Mastor Lani specifically included the disputed land as part of the immovable property to be distributed amongst the beneficiaries.

[5] Omar died intestate on 1 October 1992. After his death, there were two separate applications to distribute the estate of Omar under the Small Estates (Distribution) Act 1955. The first application was made by the second defendant and it was heard and disposed of on 21 February 1994 by the Land Administrator at Sabak Bernam. At the material time, the disputed land was not part of the distribution order.

[6] It was the second application made by the third defendant some eight years later that involved the disputed land. According to SP2, the Assistant Director of Small Estate Unit, Selangor (Barat Laut), who heard and disposed of the matter on 13 March 2012, the second application was in fact an "ulang bicara itu bagi menyelesaikan harta-harta si mati yang tertinggal pada perbicaraan yang pertama".

[7] In other words, the third defendant had filed in the second application solely in respect of the disputed land which was not included at the first hearing. As to the reason why it was left out at the first hearing will be addressed to at the later part of this judgment (*infra* para. 84).

[8] SP2, having been satisfied that all the beneficiaries of the estate had agreed between themselves, made an order of distribution in respect of the disputed land according to the law of *faraid* in that the same be transmitted to the defendants according to the following respective shares:

(i) the second defendant - 1/8 share

(ii) the fourth defendant - 1/8 share

(iii) the first defendant - 2/8 share

(iv) the third defendant - 2/8 share

(v) the fifth defendant - 2/8 share.

[9] Pursuant to this order made by SP2 ("the second hearing"), the disputed land was transmitted and duly registered in the names of the defendants according to their respective undivided shares.

[10] The defendants therefore were sued in their capacity as the new registered owners of the disputed land.

The Plaintiffs' Case

[11] The plaintiffs' case is basically hinged on two main documents namely:

(i) the unstamped sale and purchase agreement dated 27 September 1983 (exh. P1) in respect of the disputed land between Omar of the one part and Mastor Lani and Mohdir bin Anbali ("Mohdir") of the other part for a consideration of RM2,500. Mohdir who died on 24 January 2000 was the brother of Mastor Lani and the husband of the first plaintiff.

(ii) the DIPOA ("ID11"), the admission of which as evidence was vehemently objected by counsel for the defendants. I will make a ruling on the admissibility of "ID11" at the later stage of this judgment. But for the sake of completeness, the DIPOA was essentially a power of attorney for valuable consideration of RM1,000 wherein Omar had allegedly nominated and appointed Mastor Lani and the first plaintiff to be his true and lawful attorney in respect of the disputed land. The powers given to the donees in the DIPOA include to transfer, sell, charge or lease the disputed land.

[12] The plaintiffs had alleged that the second hearing in respect of the small estate distribution was tainted with fraudulent misrepresentations on the part of the third defendant. Further, the plaintiffs had also alleged that Omar had cheated the plaintiffs when he sold the property twice ie, in 1983 to Mohdir and Mastor Lani and in 1987 to Mastor Lani and the first defendant.

[13] The first plaintiff, in order to protect her interest in the disputed land, had lodged in a private caveat (exh. P14) on 7 December 2012.

[14] The particulars of the alleged fraud would be dealt with at the later stage of this judgment. Hence, according to the plaintiffs, whatever subsequent order made by SP2 at the second hearing and the eventual transmission and registration of the disputed land in the name of the defendants is not indefeasible under s. 340(2) of the National Land Code and therefore null and void.

[15] In short, the plaintiffs urged this court *inter alia* to:

(i) give judicial recognition on the validity of P1 and ID11 in that they are enforceable at law and in equity;

(ii) make declaration that notwithstanding that defendants were registered owners of the disputed land, they were in fact only bare trustees in favour of the plaintiffs; and

(iii) make a consequential order that the defendants do effect the transfer of the disputed land in the name of the plaintiffs.

The Defendants' Case

[16] The defendants in their defence pleaded that P1 ("DIPOA") was not signed by Omar at any time and that it was not even a valid sale and purchase agreement. The defendants said that since Omar had died on 1 October 1992 the said DIPOA could no longer be used and therefore had no legal effect. The third defendant specifically denied of having been given the DIPOA by one Jumiah binti Basirun (SP4) at any material time. Jumiah is also the occupant of the disputed land where she and her late husband, Abdul Basir bin Abdul Karim ("Basir") had constructed a house therein. Basir, as the record shows, was one of the two attesting witnesses to the affixation of the thumbprints of the parties in P1.

[17] Insofar as ID11 is concerned, the defendants deny that it even existed. For one, the defendants said that Omar was literate and could sign his own signature. In the circumstances, there was no reason why Omar should put his thumbprint in any document when he could actually write and sign.

[18] To prove the assertion that Omar would normally sign his own signature, instead of using his thumbprint, the defendants had adduced the driving license of Omar (exh. D17) that clearly has his signature on it. The third defendant who is SD1, in his evidence confirmed that it was his late father's signature when he said during examination in chief that "kenal pasti, tandatangan ayah saya". Since he was never cross-examined on this, I take it that the signature on exh. D17 was in fact belong to Omar. In any case, SD1 also said that his late father was a class "F" contractor and reasonably educated.

[19] The defendants also pleaded that there was a delay on the part of the plaintiffs in asserting their alleged rights in the disputed land. The defendants in para. 16 of the statement of defence stated thus:

> ... the conduct of the First Plaintiff is illogical because she appointed a solicitors (sic) in 2012 and entered a private caveat in but did not take any steps to claim and commence an action until the Writ of Summons was filed in 2015.

The Evidence: exh. P1 - The Sale And Purchase Agreement

The Unstamped Document

[20] Exhibit P1 is the alleged sale and purchase agreement dated 27 September 1983 between Omar of the one part and Mastor and Mohdir of the other part for a consideration of RM2,500 in respect of the disputed land. It was unstamped.

[21] Let me pause at this point. Section 52(1)(a) of the Stamp Act 1949 provides that:

> 52. (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that:
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under section 43 or 47A.

[22] In the circumstances, until and unless the document in question, in this case P1, is duly stamped, it shall not be admitted in evidence. But as indicated by the sub-s. (1)(a) itself, the prohibition is not absolute. In *Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors* [1982] CLJ 66B; [1982] CLJ (Rep) 217; [1982] 1 MLJ 198 FC, the then Federal Court in interpreting the s. 52 of the Stamp Act stated thus:

> It is clear that under this Section (s. 52(1) of the Stamp Ordinance 1949), except for certain types of instruments, prohibition against the admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any under section 43 and 47.

The proper procedure under such a situation is clearly expounded in the decision of the then Supreme Court in the case of *American Express International Banking Corp v. Tan Loon Swan* [1992] 1 CLJ 9; [1992] 1 CLJ (Rep) 1 SC which held that the court has power and responsibility to impound unstamped documents, if produced, and to admit them on payment of stamp duty or penalty, if any, under proviso (a) to s. 52(1) of the Stamp Ordinance 1949.

[23] Following the decisions of *Malayan Banking Bhd* and *American Express*, this court is prepared to admit P1 as evidence but hereby make a further order that the plaintiffs forthwith pay the Collector of Stamp Duty, the prescribed fees or penalty under proviso (a) to s. 52(1) of the Stamp Act.

The Thumbprint

[24] SP1, Baharum bin Ramli was called by the plaintiffs as one of the attesting witnesses to P1. As indicated earlier, the other attesting witness was Basir, deceased and the husband of Jumiah, SP4.

[25] During the examination in chief SP1 could not categorically say that the parties did affix their thumbprints before him. When asked by counsel for the plaintiffs on the matter, SP1 replied thus:

> Kemungkinan yalah jugalah. Pasal dah lama, lupalah. Pasal dah lama sangat.

[26] In any case, as stated earlier, Omar was a fairly educated person and was able to execute his own signature as shown in the driving license (exh. D17). Since he could sign by himself, the question that arises is, why did he choose to affix his thumbprint in P1? The purported agreement (P1) was made in 1983 when as early as 1975, the evidence shows that Omar could execute his own signature.

[27] However, notwithstanding that, I am prepared to accept Omar did actually affix his thumbprint on P1 based on the evidence given by SP1 and I hereby so rule. SP1 did not categorically deny that the parties affixed their thumbprints before him. He also recognised that it was his signature on P1 as one of the attesting witnesses.

[28] During cross-examination he said that he knew Omar, Mohdir and Mastor Lani. He might not be that of a close friend to Omar, but he surely knew him. As far as he could remember, the incident occurred in a house although he could not recall whose house was it.

[29] SP1 seemed to me to be a truthful witness. There is absolutely no reason for him to lie in giving his evidence. He has no interest at all in the outcome of this proceeding. Since the alleged incident took place in 1983, it is only to be expected that he could not exactly recall what actually transpired in great details.

[30] But for one, he did remember that Mohdir asked him to become the witness. So, on the balance of probabilities, I accepted that the incident did take place and that he did witness the parties affixing the thumbprints in P1. In any case, a thumbprint is just another mode of attestation.

The Evidence: ID11- The Disputed Irrevocable Power of Attorney

Is ID11 admissible?

[31] ID11 has been the subject matter of contention in the whole proceedings of this case. One of the alleged donees who is the first plaintiff (SP7), during cross-examination admitted that she never met Omar in her life. She was neither the maker nor the signatory to ID11. At best, she was only the purported donee. And yet ID11 was tendered through her.

[32] Counsel for the plaintiffs in arguing for the admissibility of ID11 submitted that, since Omar had affixed his thumbprint before a Commissioner for Oaths and duly deposited the same at the Kuala Lumpur High Court bearing registration number 1450/88 then it ought to be admitted as P11. Learned counsel then went on to refer to this court to the case of *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd* [2010] 9 CLJ 225. With respect, this case involved the creation of an irrevocable power of attorney ("IPA") where the donor and the donee were private limited companies. One

of the grounds was in fact whether s. 132C of the Companies Act 1965 was complied with. The plaintiff in that case, which sought to nullify the IPA, never questioned the execution of the document *per se* but argued on the points of law that certain procedures under the Companies Act were not followed.

[33] The instant case involved individuals instead of companies. The defendants in the instant case disputed the document itself in that it was never executed by Omar. Since it was accepted that Basir (who was one of the two attesting witnesses to ID11) had died, it is still open for the plaintiffs to call the other attesting witness to the DIPOA who was one "Kamaruddin bin Mohamad Noor" ("Kamaruddin") or even the Commissioner for Oaths, one "Rokhiah Hj Md Nor" ("Rokhiah") who attested the same. Counsel for the defendants submitted that the plaintiffs had failed to locate or to give reasonable explanation as to their whereabout. In the circumstances and relying on s. 73A of the Evidence Act 1950, counsel for the defendants further submitted that ID11 ought not to be admitted as P11.

[34] Section 73A(1) of the Evidence Act provides thus:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> (a) if the maker of the statement either:
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[35] This s. 73A of the Evidence Act is sometimes referred to as the "best evidence" rule; see *Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 9 CLJ 902; [2016] 1 MLJ 375 CA. In *Pernec Corporation Bhd v. A & AT Advanced Power Systems Sdn Bhd* [2013] 1 LNS 374; [2013] MLJU 124 CA the respondent claimed that the appellant had failed to pay consultancy fees amounting to RM496,656.00 as stated in the respondent's Invoice No. PCB 04/02 dated 19 July 2002 (exh. P21) which was derived from Celcom's Purchase Order dated 15 July 2002 ("the disputed PO") for the sum of RM4,138,800 (exh. P20). The appellant contended that it was not liable to pay the respondent as the works reflected in the disputed PO was not connected to works done under Phase 6. The respondent's claim was premised on the disputed PO which was issued by one Nik Kamaruddin Nik Ka. Unfortunately Nik Kamaruddin was not called to give evidence. Aziah Ali JCA in delivering the decision of the Court of Appeal said that:

> In the circumstances the requirement of the best evidence rule is that the maker of the document be called to testify. But the respondent did not call Nik Kamaruddin to testify in support of their contention that the disputed P.O. was related to Phase 6. We are of the view that in the absence of evidence to contradict the evidence adduced by the appellant that the disputed P.O. was not related to works under Phase 6, the disputed P.O. could not be part of Phase 6.

[36] In the instant case, while it is conceded that both Omar and Basir had died, the plaintiffs could have at least shown to the court that they have attempted to locate either Kamaruddin or Rokhiyah but to no avail.

[37] In *Sampo Materials* (*supra*), the respondent's claim also hinged primarily on two documents - the graph (P6) and the debit note (P4). It was from those documents that the outstanding sum was arrived at. Yet, the makers of both those documents were not called to give evidence. Delivering the decision of the Court of Appeal, Alizatul Khair JCA said thus:

> In our view the failure of the plaintiff to call the makers of these documents rendered them inadmissible as they had not fulfilled the best evidence rule required under s. 73A of the Evidence Act 1950.

[38] The plaintiffs in the instant case had failed to adduce any evidence to show that either Kamaruddin or Rokhiyah were dead, unfit by reason of their bodily or mental condition, beyond the seas and "it is not reasonably practicable to secure their attendance" within the meaning of s. 73A(1)(b) of the Evidence Act. In my considered view, such a failure is fatal and rendered ID11 inadmissible in evidence and I so rule.

Could ID11 Be Saved By s. 90 Of The Evidence Act?

[39] Counsel for the plaintiffs urged this court to use its discretion to admit ID11 as P11 under s. 90 of the Evidence Act. Section 90 of the Evidence Act provides thus:

A Presumption as to documents twenty years old

90. Where any document purporting or proved to be twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of the document which purports to be in the handwriting of
B any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

[40] It is to be noted that the word used in the section is "may" and not "shall". In other words, it is not mandatory for the court to raise this
C presumption. It is purely discretionary. But in the event that it does invoke the presumption, it is needless to say that the court must exercise such discretion judicially and not arbitrarily. I am fortified with this proposition of law by the lucid judgment of Malik Ishak J (as he then was) in the case of *Suratmin Othman v. Yusof Omar & Ors* [1998] 2 CLJ Supp 380 when he said:

D It was not obligatory for this court to raise the presumption under section 90 of the Evidence Act 1950 as the language employed therein being "may" and not "shall". The presumption is discretionary and where the court chooses to make the presumption, no further proof is necessary thereto. Of course, the discretion not to use the presumption must be in consonance with law and justice and great caution should be exercised
E in its application. It must be exercised judicially and not arbitrarily and this rigmarole was carried out in the present case.

[41] In my considered opinion, before this court could use its discretion under s. 90 of the Evidence Act, three conditions must be fulfilled. The conditions are:

F

(i) the document must be at least 20 years old;

(ii) it must be produced in the court from proper custody; and

(iii) the original document must be produced in court and not the copy or certified true copy of the same.

G

[42] The first condition has been fulfilled since it is common ground that ID11 was dated on 27 November 1987.

[43] As to the second (ii) condition, the question of whether ID11 did come from proper custody has been the subject of debate by the conflicting parties.
H It has been accepted that ID11 was in the custody of SP7. But the question that arises is how did ID11 come into her possession? This was not explained by SP7 in her evidence. It was certainly not Omar who handed ID11 to her since by her own admission during cross-examination, she had never met Omar. She could have obtained it from a third party who in return, acquired
I the same from Omar. But this must be explained by her in her evidence since the court is not going to exercise in surmise and conjecture. It is therefore

my finding that the proper custody of ID11 was not established. It was this break in the chain of custody that makes this court very reluctant in exercising its discretion under s. 90.

[44] As to the third (iii) condition stipulated aforesaid, it is also my considered opinion that the plaintiffs should have produced the original document of the DIPOA instead of a copy of the same. In interpreting s. 90 of the Indian Evidence Act 1872 (which is substantially similar to our Act), the Indian Supreme Court in the case of *Lakhi Baruah & Ors v. Padma Kanta Kalita & Ors* 1996 AIR 1253 after reviewing the decisions of the Privy Council on the same provision said that:

> ... but production of the copy was not sufficient to justify the presumption of due execution of the original under section 90. In this connection, reference may be made to the decisions in *Seethayya v. Subramanya Somayajulu* (LR 1928-29) 56 IA 146 : AIR 1929 PC 115) and *Basant Singh v. Brij Raj Saran Singh* (AIR 1935 PC 132 : 1935 All LJ 847 : 39 CWN 1057 : 62 IA 180). In view of these Privy Council decisions, disproving the applicability of presumption under section 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, it has been consistently held by different High Courts that production of a copy or a certified copy does not raise the presumption under section 90.

Since for reasons only known to her, SP7 failed to adduce the original document of the DIPOA, it is my finding that the presumption under s. 90 cannot be invoked. To echo the decision of the Privy Council in *Basant Singh (supra)*, the production of a copy is not sufficient to justify the presumption of due execution of the original under s. 90.

[45] In the circumstances and in answer to question posed in sub-heading (ii) herein, ID11 could not be saved by s. 90 of the Evidence Act as urged by counsel for the plaintiffs since conditions (ii) and (iii) as stated in para. 41 aforesaid have not been satisfied.

On Whose Burden Is To Prove ID11?

[46] Counsel for the plaintiffs submitted that the burden is on the defendants to prove that the thumbprint affixed on ID11 did not belong to their father. He further argued that it is the responsibility of the defendants to procure expert evidence or chemist report to prove the same.

[47] In reply, counsel for the defendants submitted that it defies logic to expect the defendants to come to this court and prove that the alleged thumbprint was not that of Omar. To begin with, counsel for the defendants argued that it has always been the stance of the defendants that their late father never ever used his thumbprints in executing any document. Secondly, since Omar had already died, how could the defendants disprove that the

thumbprint was not his? Finally, counsel for the defendants argued that since SP7 had said she had never met Omar, the onus of proving ID11 had never shifted to the defendants.

[48] With respect, I agree with counsel for the defendants that such onus of proving ID11 had never shifted to the defendants. Section 67 of the Evidence Act clearly provides that the onus is on the person who wants to tender the document in question. It is the plaintiffs who wanted to tender ID11. So they must prove it in accordance with the evidential law. If any authority is needed on this proposition, it can be found in the decision of Tan Chiaw Thong J in the case of *Tsia Development Enterprise Sdn Bhd v. Awang Dewa* [1983] 1 LNS 52; [1984] 1 MLJ 301 wherein His Lordship said that: "I would further observe that it falls upon the party seeking to produce a document to show that it is admissible in law".

[49] In the circumstances, if at all, there is any duty to call an expert witness, such a duty falls on the plaintiffs. In *Suratmin Othman (supra)*, the plaintiff, the lawful son and administrator of the estate of one Hajjah Rugayah, contended that, by a deed of sale dated 6 February 1954 ('ID1'), the first defendant's late father, one Haji Omar, who was then holding the land as representative of the estate of one Haji Sidek bin Ahmad, had sold the land to Hajjah Rugayah for RM700, and that being so, claimed ownership of the land and sought for a declaration to that effect. The learned judge in his judgment said this:

> It was incumbent on the plaintiff to call an expert evidence to strengthen the point that the deed of sale (ID1) was actually in the handwriting of the late Hj. Omar bin Hj. Sidek (*Shriro (China) Ltd and Ors v. Thai Airways International Ltd* [1967] 2 MLJ 91 F.C), yet this was not done. It is trite law that the production of the deed of sale as per "ID1" purporting to have been written by the late Hj. Omar bin Hj. Sidek cannot be construed as evidence of its authorship. Put differently, the production of a document purporting to have been signed or written by a certain person is, in law, no evidence of its authorship. There must be proof as to the genuineness and execution of the document.

Observation On s. 5 Of The Powers of Attorney Act 1949

[50] Be that as it may, I would like to make an observation on the submission of counsel for the defendants that ID11 is no longer valid since Omar had long died. He relied on s. 5 of the Powers of Attorney Act. Section 5 of the Act insofar as it is relevant, *inter alia* provides that a power of attorney shall remain in force until either the donor or the donee has died. This argument is clearly misplaced. With respect, and as rightfully pointed out by counsel for the plaintiffs, the DIPOA was allegedly a power of attorney for valuable consideration within the meaning of s. 6(1)(a) of the Act and shall continue to be valid even on the death of the donor. The Federal

Court in *Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor* [2013] 5 CLJ 425 FC reiterated the legal position that s. 6(1)(a) of the Act:

> ... protects a purchaser who purchased property from a donee of a power of attorney expressed to be irrevocable and given for valuable consideration. In our view the clear language of s. 6(1)(a) "... or by death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power," is unequivocal in its stand as to instances when a power of attorney cannot be revoked.

The Law

[51] Since I have ruled that ID11 is not admissible and shall not be referred to, the plaintiffs' case hinges only on the only document available which is P1. I will then go through the said document together with the evidence given by the witnesses.

Are The Defendants The Bare Trustees?

[52] The plaintiffs in para. 36(b) of the statement of claim sought a declaration that the defendants are only bare trustees in respect of the disputed land. Counsel for the plaintiffs referred me to the case of *Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359; [1991] 2 MLJ 261. But the factual matrix in that case is distinguishable from the instant case. In *Borneo Housing*, Dunstan Dumpangol ("DD") who was the registered owner of the native land was himself a trustee on behalf of the company known as Pegalan Development Sdn Bhd of which he was the chairman. More importantly, DD had executed fresh memoranda of transfer in escrow in favour of 29 of the purchasers. Syed Ahmad Idid JC (as he then was) after reviewing a few authorities on the subject matter held that a registered owner, by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the *bona fide* purchaser. The registered owner in effect becomes a bare trustee.

[53] Counsel for the plaintiffs also referred the court to the case of *Datuk Harris Mohd Salleh v. Seck Mun Foo* [1999] 2 CLJ 545; [1999] 2 MLJ 442 CA. But this case involved a gift in respect of the land and not a normal sale and purchase transaction. The Court of Appeal found that there was sufficient evidence for the trial judge to come to a finding that the land was intended to be a gift to a golf club although it was still registered in the name of the appellant. The intention was demonstrated by the appellant to transfer the land to the club when he signed the transfer and delivered it to the club. Again the case is distinguishable with the instant case.

[54] Counsel then relied on the case of *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener)* [1994] 3 CLJ 265. Unfortunately, unlike in the instant case, the facts of that

A case involved a proper trust deed executed by the trustee and one of the issues raised was whether the beneficiaries therein had capacity to make an enforceable contract of sale. In fact, Shankar J (as he then was) even held that the trust in question was more than a bare trust in the said land.

B **[55]** It is to be noted that all of the cases cited by counsel for the plaintiffs involved lands that had no restrictions in interest.

[56] In the instant case, there was no evidence that Omar, the then owner, had executed any memorandum of transfer in favour of Mohdir and Mastor Lani after the title deed was issued to him by the State Authority. While the C consideration of RM2,500 was paid in full and duly acknowledged by Omar, the transaction could not be considered as having been completed for the purpose of a registrable transfer. Clause 6 of P1 clearly provided that Omar had agreed to apply the consent from the State Authority for the disputed land to be transferred and duly registered in the name of Mohdir and Mastor Lani. The cut-off date is "setelah geran tanah tersebut dikeluarkan oleh (sic) D pihak Kerajaan kelak".

[57] The title deed was finally issued and registered in the name of Omar on 16 February 1987 ("P3"). The fact that the disputed land 'cannot be transferred, leased or charged except with the consent of the State Authority' E was also reflected and clearly laid down in the title deed in that: "Tanah ini tidak boleh dipindah milik, dipajak, digadai atau dicagar dengan apa cara sekalipun melainkan dengan kebenaran Pihak Berkuasa Negeri".

[58] There was no evidence to suggest that in between the issuance of the title deed and his death on 1 September 1992 Omar had taken the necessary F steps to apply for the consent from the State Authority in order to perfect the alleged transfer. Omar could have inadvertently forgotten about his obligation to apply for the aforesaid consent. He could have been negligent. His failure could have even been wilful. At the risk of being repetitive, and in the absence of clear evidence, this court is not going to engage in surmise G or conjecture.

[59] It is also important at this stage to note that both Mohdir and Mastor Lani survived Omar. Mohdir died on 24 January 2000 (P12) and Mastor Lani died on 26 October 1992 (P9). Bearing in mind that the title deed of the disputed land was issued in 1987 and had since been in the custody of H the first plaintiff the question that arises is the following. Did both Mohdir and Mastor Lani approach or otherwise demand Omar to make the necessary application for consent from the State Authority to transfer the disputed land in order to perfect the transfer? It is highly unfortunate that this question can never be answered.

I

[60] In the circumstances until and unless the necessary consent from the State Government is properly obtained, there was no registrable interest in favour of Mohdir and Mastor Lani, let alone a caveatable interest. Put it simply, the transaction is inchoate.

[61] The Federal Court in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Berhad (Formerly Known As Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 MLJ 12 FC after having reviewed the relevant authorities said that:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

The key phrase to my mind is registrable transfer in favour of the purchaser. But such registration of the transfer in the instant case is contingent upon the consent from the State Authority. Without such consent, the transfer document even if executed by Omar and presented to the respective land office at any material time, cannot be said to be registrable. The interest of Mohdir and Mastor Lani, if at all, is therefore *in futuro* and not *in praesenti*.

[62] In any case, this court has no power or discretion to interfere or intervene on the matter of consent in respect of the transfer of the disputed land which is purely under the jurisdiction of the State Authority. It is trite that land matters are within the exclusive jurisdiction of the state; see Ninth Schedule List II - State List (2)(a) and (e) of the Federal Constitution of Malaysia. It is therefore within the exclusive powers of the State Authority to impose the restriction of interest in respect of any transfer of land within the State. If an Act creates an obligation, and empowers the obligation in a specified manner, as a general rule that performance cannot be enforced in any other manner; see *Doe D Rochester (BP) v. Bridges* (109 ER 1001, 1006) which was followed by the then Federal Court in *Sidek Hj Muhamad & Ors v. The Government Of The State Of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321; [1982] 1 MLJ 313 FC.

Conclusion So Far

[63] Until the consent of the State Authority is irrevocably obtained, the transfer process is far from being perfected. Omar and Mahdir and Mastor Lani were just parties to a contract of the sale of land.

[64] In delivering the decision of the Federal Court in *Borneo Housing Mortgage (supra)* Edgar Joseph Jr FCJ said:

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at *Shah Alam in Ahmad bin Salleh v. Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211 that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

[65] Having discussed the aforesaid authorities, in my considered view for the plaintiffs to succeed in the "bare trustee argument" they must have shown to this court that:

(i) there was a valid sale and purchase agreement;

(ii) the full purchase price must have been paid in full;

(iii) the consent of the state authority for Omar to transfer the disputed land to Mohdir and Mastor Lani must have been irrevocably obtained; and

(iv) Omar must have given to Mohdir and Mastor Lani a duly executed, valid and registrable transfer of the land in due form in favour of the both of them.

[66] Even if I were to accept that requirements (i) and (ii) have in fact been fulfilled, it is obvious that the remaining conditions of (iii) and (iv) were not met. In the circumstances, it is my finding that there was no bare trust in favour of Mohdir and Mastor Lani and I so rule.

[67] The attendant consequent of my finding on the issue of the bare trust would be that neither Mohdir and Mastor Lani nor any of the plaintiffs would have any caveatable interest in the disputed land. In *Goo Hee Sing v. Will Raja & Anor* [1994] 1 CLJ 255, the land in question was, not unlike the instant case, subject the same restrictions in interest in that it cannot be transferred, leased or charged except with the consent of the State Authority ie, the Pihak Berkuasa Negeri. Shankar J (as he then was) held that consequently it must follow that a prospective purchaser, chargee, or lessee of such land can have no caveatable interest in the same until the consent of the Pihak Berkuasa Negeri has first been irrevocably obtained.

On The Allegation Of Fraud

[68] The plaintiffs in para. 33 of their statement of claim had made an allegation of fraud against Omar and the defendants which will be dealt with in turn.

Allegations Of Fraud Against Omar

[69] As intimated earlier *(supra)* the plaintiffs alleged that Omar had "sold" the disputed property twice. The first being P1 and the second was ID11. The first plaintiff (SP7) in answer to question 10 of her witness statement said

that when Omar purportedly sold the disputed land to and Mohdir and Mastor Lani (by way of P1) he did not have a valid ownership registered in his name at the material time.

[70] But this was clearly stated and conceded by Omar and accepted by the parties in P1. Although the issue document of title ("IDT") was yet to be issued to Omar at the time P1 was executed, the disputed land was properly identified as "Lot No. 2333, Mukim Sungai Panjang". True enough, when the IDT was eventually issued to Omar in 1987 in the form of exh. P3, the disputed land was known as PM 193 Lot No. 2333, Mukim Sungai Panjang. The phrase "setelah geran tanah tersebut dikeluarkan oleh (sic) pihak Kerajaan kelak" as in cl. 6 of P1 *(supra)* means that both parties recognised that the IDT has yet to be issued by the State Authority at the material time. I cannot find any truth in the allegation of fraud on the part of Omar. Omar's action could only be construed as fraudulent either (a) if there was no reference at all to the Lot number in P1 or (b) there was such reference but the IDT was not issued to him at the later stage.

[71] I also find that the allegation of Omar having "sold" the disputed land twice is misplaced. To begin with, I have made my ruling to exclude ID-11 in this proceeding. In any case, even if I take into consideration of the existence of ID-11, it is not by itself, a sale and purchase agreement and I so hold. An irrevocable power of attorney, even if for a valuable consideration within the meaning of s. 6 of the Powers of Attorney Act, is just what it is - a power of attorney. It cannot be construed as a sale and purchase agreement with the necessary essence and ingredients of a valid and enforceable contract.

[72] The necessary implication of ID11 being excluded in the evidence means that Omar could not have "sold" the disputed land twice. The first plaintiff also said in her witness statement that Omar had misrepresented to both Mohdir and Mastor Lani for failure to stamp P1. With respect, failure to stamp P1, at best, was only negligence on the part of Omar. Such failure cannot be construed by any stretch of legal imagination as a fraudulent misrepresentation. The Court of Appeal in *KGV & Associates Sdn Bhd v. The Co-Operative Central Bank Ltd* [2006] 4 CLJ 241; [2006] 5 MLJ 513 CA clearly held that it is trite that negligence is not fraud.

Allegations Of Fraud Against The Defendants

[73] The second plaintiff (SP6) in his witness statement had made the allegation of cheating against the defendants on a few occasions. The first being at the second hearing of the small estate matters in respect of the disputed land. Referring to notes of SP2 at the second hearing (P2), the second plaintiff said that the third defendant had misled SP2 by saying that the disputed land was occupied by his relative.

[74] The notes of proceedings (P2) made by SP2 insofar as they are relevant are as follows:

PM193 - 3 1/2 ekar lebih

1/1 Bhg - Sawit - saudara yang tinggal uruskan

- Rumah - saudara tinggal sini
- Tahun 2012 Ramadzan bayar
- Hak milik asal tiada, ada di pejabat
- jual beli, pajak gadai - tiada

The second plaintiff said it was Jumiah (SP4) who stayed there and Jumiah was not related to the defendants. In any case, he further said in his witness statement that the oil palm plantation was cultivated by the first plaintiff and not by the relatives of the defendants.

[75] Let us analyse the evidence given by SP2 who presided and wrote the notes of proceedings at the second hearing. First he said the phrase "Hak milik asal tiada, ada di pejabat" meant "pejabat tanah" or the Land Office. Questioned by counsel for the plaintiffs, he said "saya terlupa untuk letakkan penuh daripada Pejabat Tanah". The notes were so brief that on its own it is difficult to understand its true meaning. But if the notes of proceedings of the second hearing were to be read together with the evidence of the recording officer SP2 it should have been read "hak milik asal tiada, ada di pejabat tanah". I do not find anything cynical or even suspicious with the statement, let alone to conclude that the third defendant had misled SP2 at the second hearing.

[76] Secondly, the plaintiffs questioned the meaning of "sawit - saudara yang tinggal uruskan" and "rumah- saudara tinggal sini" as per the notes of proceedings of the second hearing. SD1 in his explanation said that what he meant at the proceedings was there was another neighbouring oil palm plantation cultivated by his relative by the name of one Hussein bin Abdullah. On this he was never cross-examined by counsel for the plaintiffs. I therefore accept his evidence that he has a relative in the neighbouring land. As I intimated earlier, the notes of proceedings of the second hearing were rather brief. It was not *verbatim*. There was no proper record of the witness statement or statements as the case may be. It is therefore completely unjustified for me to make a positive ruling on a serious allegation of fraud based on an incomplete note of proceedings of SP2 at the second hearing.

[77] I would like to pause at this moment to refer to the police report by SP7 against the defendants in respect of concealing the information at the second hearing. This report, together with another police report made by the third defendant in respect of the missing title deed of the disputed land were collectively marked as P15. The police report against the defendants by SP7 (the first plaintiff) was lodged in 2014.

[78] According to SD1 he was investigated under s. 420 of the Penal Code which is a serious offence of cheating and he gave statement to a police officer on the matter. Two years after the police report was lodged (and after statement was taken from him by a police inspector) and as at the date of hearing, the evidence shows that SD1 was never charged with any offence in respect of the disputed land.

Allegations Of Fraud: The Law

[79] It is trite law that the existence of fraud is a question of fact. And it is to be decided on each particular case. In the context of the Torrens system, the fraud in question has to be 'actual fraud' which is to be distinguished from 'constructive fraud' and 'equitable fraud'. In *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 FC Raja Azlan Shah CJ (Malaya) (as His Highness then was) had made this observation:

> Fraud must mean "actual fraud, i.e. dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are … inaccurate;" but "'fraud' … implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (per Romilly M.R. in *Green v. Nixon* (1857) 23 Beav 530 535 53 ER 208). Thus in *Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd* [1926] AC 101 & 106 it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …"

[80] Applying the law to the instant case, could the act of SD1 (the third defendant) in applying for the disposal of the estate for Omar in respect of the disputed land at the second hearing be said to be "wilful act, on the part of the defendants, whereby the plaintiffs are sought to be deprived, by unjustifiable means, of what they are entitled"? The short answer to this is in the negative. My reasons are as follows.

[81] The essence of the plaintiffs' complain in a nutshell is that the defendants, in particular the third defendant, had misled SP2 at the second hearing so as to influence SP2 in making an order that he did in transmitting the disputed land to the defendants. The plaintiffs argued that if the defendants really believed that the disputed land was rightfully theirs, why did not they include the same at the first hearing of the estate matter in 1994? The answer to this was given by SD1 (the third defendant) in that nobody in the family knew of the exact location and details of the disputed land until 2010. The fact that the family did not have custody of the IDT of the disputed land did not help. In 2010, the first plaintiff together with Jumiah (SP4) went to the second defendant's (Latifah binti Omar) house and told her of the existence of the land and the alleged sale of the same by Omar.

[82] Although the second defendant had allegedly told the visitors that "what is yours is yours", she could not in any event represent the other beneficiaries of the estate of Omar. Even if I were to accept the evidence of SP4 and SP7 on the words allegedly uttered by the second defendant it could not be legally binding on all defendants. It is clearly unfortunate that we were deprived of the evidence of the second defendant.

[83] Counsel for the plaintiffs indicated to the court at the start of the proceedings that they might be calling one of the defendants to give evidence on their behalf. But at the close of the plaintiffs' case this was not done. In the circumstances, the court did not have the benefit of the surrounding circumstances that led to the discussion between SP7 and SP4 and the second defendant. I must add that it is not the defendants' duty to strengthen the plaintiffs' case. If there is any such gap, the plaintiffs must close it.

[84] It was after this visit that SD1 claimed that he knew about the location of the disputed land and began to make the necessary search at the land office. After having located the exact area of the land and the details thereto, he filed in the application for the second hearing. That explained why the disputed land was not listed as one of the immovable properties belonging to Omar at the first hearing. The rest, as they say, is history.

[85] The plaintiffs also alleged that when the third defendant proceeded with the second hearing to dispose the disputed land according to the *faraid* law it was with full knowledge of the plaintiffs' right in the same. That, to the plaintiffs constituted fraud. In my judgment, knowledge *per se* of an unregistered interest does not in itself constitute fraud. It has to be followed by dishonesty. But the law is that dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

[86] From the evidence before me, I cannot find any indication at all that the defendants were dishonest and I so hold. The third defendant in filing in an application for a second hearing was only asserting the rights of the defendants under the *faraid* law. He could have known the claim on the disputed land by the plaintiffs but what is clear is that the plaintiffs did not have a 'known existing right' in the disputed land.

[87] The Federal Court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 quoted with approval the decision of the Privy Council in *Waimiha Sawmilling (supra)* Edgar Joseph Jr FCJ, delivering the decision of the apex court had this to say:

> *Waimiha Sawmilling*'s case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title.
>
> In the course of his judgment, Lord Buckmaster speaking for the Board, after referring with approval to the definition of fraud laid down by Lord Lindley in *Assets Co*, said this (at pp. 106-107):

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

[88] Even if I were to assume that the remaining defendants (including the third defendant) knew about the visit of SP7 and SP4 to the second defendant's house in 2010, it was a good two years that the third defendant filed in the application for the second hearing in 2012. Nothing was done by the plaintiffs in between 2010 and 2012 to assert their rights, if any, in the disputed land.

[89] The plaintiffs in the instant case sought for declaratory reliefs *inter alia* that the defendants were only the bare trustees in favour of the plaintiffs in respect of the disputed land. It is trite law that a declaration is an equitable remedy; *Chen Kow lwn. Yew Sin Motor Supply Sdn Bhd* [1994] 4 CLJ 495. In *Matair Suhaili & Anor v. Rose Foo Chin Lan & Ors* [2007] 5 CLJ 406 CA, Mokhtar Sidin JCA reiterated the same proposition of law that he was "fully aware that declaration is an equitable remedy". In the circumstances, equitable remedy should be governed by equitable maxims.

[90] In my judgment, there was a clear delay on the part of the plaintiffs in asserting their rights, if any, in the disputed land. Apart from lodging in a private caveat (exh. P14) on 7 December 2012, the first plaintiff did nothing to enforce her rights, if any, in the disputed land. The same goes to both Mohdir and Mastor Lani. They survived Omar but did nothing to assert their rights, if any, in the disputed land. The first plaintiff did nothing to enforce her alleged interest notwithstanding the fact that all these years the receipts of the quit rents which she paid, bore the name of Omar. There was a good five years between the issuance of the IDT in respect of the disputed land and the death of Omar. They were practically sitting and sleeping on their rights and the well-established equitable maxim is *vigilantibus et non dormientibus lex succurrit* - equity aids the vigilant, not those who slumber on their rights.

[91] I cannot help but borrow the remarks made by my learned brother Lee Swee Seng JC (as the then was) in the case of *Mah Siew Seng & Anor v. Seema Development Sdn Bhd & Another Case* [2013] 8 CLJ 1058 this plaintiffs' action in the instant case is "stained with scarlet from sitting and sleeping on its right, inviting laches like leeches to suck dry any life-giving blood left". His Lordship then continued to say "such a long delay is deleterious and damaging" since "time and tide wait for no man".

[92] In the circumstances where there is clear evidence of laches, acquiescence and delay on the part of the plaintiffs, as in the instant case, discretion should not be exercised in their favour; *Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor* [1985] 1 LNS 44; [1985] 2 MLJ 380 SC.

[93] The same equitable principle was applied in *Malaysia National Insurance Sdn Bhd v. Tan Kong Min* [1997] 3 CLJ Supp 121, when RK Nathan JC (as he then was) held that:

> The conduct of plaintiff in delaying the enforcement of its right clearly calls for the application of the equitable doctrine of laches. The maxim *vigilantibus et non dormientibus lex succurrit* ought to apply.
>
> It is unjust to give the plaintiff a remedy where it has by its conduct done that which might fairly be regarded as equivalent to a waiver of it.

Decision

[94] In the light of the reasons already given, my decision would be as follows:

(i) the defendants are not the bare trustees for the benefit of the plaintiffs;

(ii) ID11 is not admissible as evidence and therefore shall not be referred to;

(iii) P1 though admissible is subject to the plaintiffs to forthwith pay the collector of stamp duty, the prescribed fees or penalty under proviso (a) to s. 52(1) of the Stamp Act;

(iv) P1 is a contingent contract in that it is subject to the consent of the state authority which was never obtained;

(v) until and unless the consent is obtained by the State Authority, P1 is not enforceable since the court has no power to instruct the State Authority on what is exclusively within the jurisdiction of the State Authority;

(vi) there was no fraud on the part of either Omar or any of the defendants so as to defeat the indefeasibility of title of the defendants within the meaning of s. 340(2)(a) of the National Land Code;

(vii) since the defendants are the registered owners of the disputed land their rights to the title of the land is indefeasible under s. 340 of the National Land Code;

(viii) since declaratory reliefs sought by the plaintiffs are equitable in nature, the plaintiffs are caught by the equitable maxim of *vigilantibus et non dormientibus lex succurrit*; and

(ix) the plaintiffs claim is hereby dismissed and with costs of RM10,000 subject to allocatur.

Epilogue

[95] I am mindful of the implication of this judgment on Jumiah (SP4) in that she is what can be considered as a collateral damage in a proceeding that she is not even a party to.

[96] Her future seems uncertain. She is staying in her own house but on a land which does not belong to her. But that was the arrangement she made with the late Mastor Lani and she did so at her own peril. In as much as I sympathise with her, I have to assert that this is not a court of morals but a court of law.